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No. 8, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Before The Special Master — Frank J. McGarr

MEMORANDUM OPINION, REPORT AND ORDER NO. 14

September 20, 1993

18 pp

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

STATE OF ARIZONA, Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.	)	No. 8, ORIGINAL **MEMORANDUM OPINION AND ORDER NO. 14**

An Opinion of the Special Master dated November 4, 1992 addressed a Rule 56 motion by the State Parties for Summary Judgment. The judgment sought was a ruling that the Executive Order of May 15, 1876 established the west bank of the Colorado River, subject to the rules governing erosion, accretion and avulsion, as a portion of the western boundary of the Colorado River Indian Reservation. The motion was denied for the reason that there were disputes as to the facts and circumstances surrounding the issuance of that order which required a hearing.

That hearing has been completed and post-hearing memoranda and proposed findings of fact have been filed. By agreement of the parties, the sole issue to be resolved is the meaning of the Executive Order of 1876 and whether the disputed portion of that order establishing the western boundary of the Colorado River Indian Reservation intended the boundary to be a fixed line or a riparian boundary. It is that issue which is the subject of this opinion.

Before particular findings are made, a discussion of some general issues are appropriate. At the outset it should

be observed that a call to the bank of a river clearly indicates an intent to create a riparian boundary. The burden of proving otherwise, which here falls on the United States and the Tribes, is a substantial one.

The Colorado River Indian Reservation was created by Congress in the Arizona Territory by an Act of March 31, 1865 and that Act established the Colorado River as the reservation's western boundary. An addition to the reservation by virtue of an Executive Order of November 27, 1873 added additional lands and continued to refer to the reservation as bordered on the west by the Colorado River.

At the instance of the Reservation's Indian Agent Tonner, the reservation was further expanded by an Executive Order of November 16, 1874. The order incorporated Tonner's sketch and boundary description which mislocated two of the landmarks forming points on the boundary resulting, as a later survey revealed, in cutting off a large tract of land between the East boundary of the reservation and the river, a result clearly not intended by Tonner and in fact thwarting his stated purposes in the proposed enlarging of the reservation in the first instance.

The discovery of this evident mistake prompted Tonner's successor as Indian Agent, one W.E. Morford to seek a correction and his proposal resulted in the Executive Order of May 15, 1876. The language of that order pertinent here establishes the western boundary of the reservation as a direct line from the top of Riverside Mountain to the west bank of the Colorado River ". . . thence down said west bank to a point opposite the place of beginning. . . ."

It is central to the position of the United States and the Tribes that the Order of 1876 must be interpreted

to include the purposes of the Order of 1874. Agent Tonner was the progenitor of the Order of 1874 and it may be assumed to satisfy his stated concerns. The mistake agent Tonner made created a serious situation depriving the Reservation of contiguity with the river for a substantial distance, a mistake which clearly demanded correction. But the mistake was discovered after Tonner had been replaced as Indian Agent by Agent Morford and there is no evidence that Morford had any other purpose than to correct the unacceptable anomaly of the significant reduction of the Reservation and its separation from the life giving river. Whether Morford in his recommendations which led up to the corrective Executive Order of 1876 shared Tonner's goals or even knew of them is a question not answered in this record. This leaves us with the necessary conclusion that we must regard the 1876 Executive Order as free of ambiguity and in its plain meaning, controlling here. It is further evident that despite some resourceful arguments to the contrary, the phrase "west bank" meant in 1876 what it means today; that is that line formed where the water meets the land.

The historical record makes it clear that a salient feature of the government's intent and an essential element of the Indian's welfare was access to the river, both for the agricultural richness of bottom land soil and for the harvest of the bounty of the river. This circumstance argues against the concept of a fixed line boundary which could foreseeably separate the reservation from the river by the changing of its channel. The record supports the contention that to give the Indians the benefit of the river, Tonner sought a fixed line to the west of the river to give the reservation land on both sides of the river, thus eliminating the meandering river problem. The 1876

order correcting his mistake however, lost sight of this goal and simply restored to the reservation the land on the east side of the river which Tonner had unintentionally deprived them of. The overriding goal of giving the Indians the benefit of riparian access to the river was thus satisfied. Tying the western boundary of the reservation to the river solved a problem caused by the moving river channel.

Tonner's original plan to solve the problem of a moving river as a boundary was not to establish a fixed line, in lieu of the river, but to solve the problem by putting the reservation on both sides of the river. That his mistake and the subsequent correction nullified that goal does not compel any reading of the phrase "west bank" other than its plain intendment.

There is no doubt that Tonner intended a Reservation of total fixed boundaries including land on both sides of the river, and so did the Executive Order of 1874 which Tonner's recommendations inspired. When the order was discovered to have unacceptable consequences and was corrected by the order of 1876, it is tempting but inappropriate to try to read 1874 intentions into the 1876 Order, but whether by design or omission, the 1876 Order abandons the concept of land west of the river and its plain meaning cannot be ignored. The contrasting arguments of the parties as to the fact that the 1876 Order did not disavow or reaffirm the intentions of the 1874 Order are of no consequence. It did neither and therefore, as the controlling language in this case, it stands alone. The Executive Order did what it did. Its intent was to do what it said it was doing and the 1876 order said it was making the west bank of the river the reservation boundary. So unless "west bank" means something other than the western shore of the river where the water meets the

land, the river and not a fixed line is the boundary of the reservation.

So we turn to "west bank" and the meanings that might be read into that phrase. The Tribes and the United States argue that the west bank means the bluff to the west of the river. The argument is to the effect that the intention of the United States to solve the moving boundary problem is evidenced by the fact that Morford's language making the "river" the boundary was changed in the Executive Order to the "west bank" of the river. This is speculation as to intent. It may just as well be the fact that since the fixed line meets the river on its west side, the phrase "west bank" seemed more precise to the drafter, and if the drafter of the order intended in fact to describe a boundary which would include in the reservation a large area of land west of the river, he could have sensibly accomplished this by referring to the bluff itself, a somewhat vague boundary, or more precisely, establishing a fixed line following the outlines of the bluff.

Two esteemed experts testified, and of course disagreed, as to the meaning and intent behind the phrase west bank. To the extent that the experts uncovered documents and drew up historical knowledge relevant to the issues, they were helpful and their contribution to the case is appreciated. To the extent that either of them indulged in speculation as to the intentions of the actors in the 1874-86 events, those speculations have been argued by counsel and treated in this opinion and need not be further discussed. Speculation, however appealing or well intended does not form an adequate foundation for legal conclusions.

Such speculations, pro and con, drive us back to the real issue of what the drafter meant by west bank as measured, not by his presumed intent, but by what he said.

The United States and the Tribes rely on the Canons of construction in support of the Tribes' claims. It is true that there is a well established Canon on construction mandating the resolution of doubtful meanings in favor of Indian claims. But it is not applicable here because there is no ambiguity in the meaning of the phrase "west bank" and this rule of construction does not apply.

There is no convincing evidence that "bank" in 1876 meant anything different than it does today. To quote documents of the time to the effect that a tribe was located "on the east bank" or that a tribe was allowed by treaty to occupy lands on the right bank of the river is to look to a different usage and context than found here, and these phrases are not contrary to the conclusion that "bank" used in a boundary description means the edge of the water. The treaty between the Mojaves and Chemehuevis which allowed the latter to occupy lands on the "right bank" of the river merely established the river bank as one boundary of the ceded land.

The Tribes and the United States argue further that a letter dated October 11, 1877 from Commissioner of Indian Affairs Hayt demonstrates a belief that the Colorado River Indian Reservation lay on both sides of the river. Hayt's reliance on the Executive Order of 1874 which was designed to achieve this result is apparent, but he seems unaware that the corrective order of 1876 undid that result.

Hayt's letter must be seen in a broader context than the document alone. In 1877 a private citizen, named Snyder wrote to the General Land Office about misuse of lands in the Palo Verde Valley to the detriment of the Chemehuevi Indians. The land office referred the letter to the Commissioner of Indian Affairs who in a letter dated 1877 stated that the 1874 Order and 1876 Amendment created

a Colorado River Indian Reservation which included the land which was the subject of Mr. Snyder's concern, on the California side of the river.

The addressee of Commissioner Hayt's letter was General Land Office Commissioner Williamson who disagreed with Hayt's conclusion as to the boundary of the reservation, and the Secretary of the Interior who was superior to both seems to have acquiesced to Williamson's view. Under these circumstances, Hayt's view deserves little weight, especially in view of the fact that over the subsequent years the Department of the Interior and the Indian Office read the 1876 Order to establish a moving river boundary. A bank is a bank. A bluff is a bluff. If a bluff was intended as a boundary, it could have been denominated as such. There is no historical record that in the formulation of the Executive Order of 1876, anyone involved considered a bluff to be a boundary. There is no indication that anyone knew of the bluff or its location or of the quantity of land which would be added to the reservation by regarding the bluff rather than the river shore as the reservation boundary.

The fact that in 1881 the Secretary of the Interior transferred 40,000 acres of the disputed area to the State of California for private development argues strongly for the position that these were not believed to be Reservation lands.

The United States and the Tribes in their argument for the geologic bluff as the true meaning of the west bank would substitute for the clearly ascertainable actual river bank, an indeterminate line farther west delineated by a vague and not continuous geological feature. The difficulties created by the meandering river are no greater than the difficulties occasioned by the determination of this vaguely described line.

Neither does the record compel the conclusion that the 1874 order was to create, among other things, the expansion of the reservation into California for the benefit of the Chemehuevis. Whether Tonner had this intention does not now matter. He intended a fixed line west of the river. He made a mistake and the correction of the mistake created a reservation boundary that did not go west of the west bank of the river. While it can be argued that in isolated instances, one possible interpretation of a writing or a circumstance supports the conclusion that the Executive Order of 1876 contemplated a fixed line including land west of the river in the Colorado River Indian Reservation, the manifest weight of the evidence is to the contrary.

Further strong evidence in support of this conclusion is the fact that the United States and the Tribes filed pleadings in the case of *U.S. v. Aranson*, 696 F.2d 654 (9th Cir.) *cert. denied* 464 U.S. 982 (1983). While the contention was rejected in this instant case in the Opinion of November 4, 1992 on summary judgment that *Aranson* was the basis of judicial estoppel, the earlier position of the United States and the Tribes in the *Aranson* case is a factor which has evidentiary weight in the determination of the issue addressed herein. In the *Aranson* case the Government and the Tribes unequivocally urged upon the Court the position that the Colorado River was the moving boundary of the reservation, and that contention has relevance here. Judgment on this issue must be for the State Parties. There is no ambiguity in the Order of 1876 in its call to "the west bank of the Colorado River." The boundary thus described is where the water and the land meet, subject, as it must be, to the rules of erosion, accretion and avulsion.

In support of and in furtherance of this determination the following findings of fact and conclusions of law are entered herewith:

1. The Colorado River Indian Reservation ("Reservation") was created by Congress in the Arizona Territory by the Act of March 3, 1865 (13 Stat. 541, 559), which provided that:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

AI U.S. Ex. 501. That Act established the Colorado River as the Reservation's western boundary.

2. An Executive Order of November 27, 1873, added certain adjoining lands in Arizona to the Reservation, including bottom lands to the south of the original Reservation also bordered "on the west by the Colorado River." AI U.S. Ex. 503. That order continued the Colorado River as the Reservation's western boundary.

3. On October 22, 1874, Reservation Indian Agent J.A. Tonner wrote to the Commissioner of Indian Affairs recommending another extension of the Reservation both within Arizona and across the river into California, expressing concern about (1) "encroachments" on the Reservation by "worthless whites and Mexicans," (2) "transfers of land by change of channel in the Colorado River," and (3) "avoiding future trouble by including all arable land in the vicinity of the reservation" within its boundaries. SP Ex. 4.

Tonner included language for an Executive Order which redefined the boundaries of the total Reservation entire-

ly by lines connecting identifiable natural monuments. A sketch map included with his description resembled a lopsided rectangle with the Colorado River flowing through the middle of the proposed expanded Reservation. SP Ex. 4. Neither Tonner's letter, diagram nor proposed Executive Order mentioned or identified a high bluff to the west of the Colorado River as part of the boundary in California. Two of the major connected landmarks shown on Tonner's sketch and referenced in his boundary description were substantially mislocated. Only a small portion of the arable lands in the northeastern corner of the Palo Verde Valley in California were shown within the expanded Reservation.

4. Commissioner of Indian Affairs E.P. Smith forwarded Tonner's proposed Executive Order to the Secretary of the Interior and recommended that it be issued. The Secretary concurred and forwarded it to President Grant, who issued it on November 16, 1874 ("1874 Order"). AI U.S. Ex. 504. Neither letter mentioned a high bluff to the west of the Colorado River as part of the boundary in California.

5. The Chemehuevi Tribe of Indians in California were among the tribes identified for settlement on the Reservation when it was created in Arizona in 1865, but hostile relations with the Mojave Tribe resulted in the Chemehuevis staying in their traditional areas on the west bank of the Colorado River.

Tonner's 1874 recommendation did not state that a purpose of the proposed expansion was to include the Chemehuevis within the expanded boundaries of the Reservation in California, nor did the subsequent correspondence and the 1874 Order. Tonner's boundary description would only have included their settlement in the Riverside Mountain

area and his sketch map would only have included a small portion of their settlement in the northeastern Palo Verde Valley.

6. A survey of the enlarged Reservation was requested by Commissioner Smith and conducted by the General Land Office ("GLO") in November 1875. The approved survey showed that a boundary line from the top of Riverside Mountain, California, southeasterly to the point of beginning at La Paz Arroyo in Arizona, which line Tonner had shown to be entirely west of the river because he mislocated Riverside Mountain, actually crossed the river and ran in large part on its east side, leaving a substantial block of land in Arizona between the new Reservation boundary and the Colorado River to the west. SP Ex. 5.

7. In December 1875 W.E. Morford replaced Tonner as Indian Agent. There is no evidence that Tonner, who had been absent from the Reservation for most of 1875, had ever briefed Morford on his earlier 1874 boundary recommendation. Morford informed J.Q. Smith, the new Commissioner of Indian Affairs, in early 1876 that the 1874 Order "cuts off a large tract of very valuable land upon the east side of the River, and gives a very strong foothold to a certain class of men that desire to be in close proximity to the Indians, for unlawful and improper purposes." Morford therefore requested that an Executive Order be issued to change the boundary line "between Riverside Mountain and La Paz Arroyo, making the Colorado River the boundary line" instead. AI U.S. Ex. 505a. He stated no other purpose than to restore the severed lands in Arizona, nor did he mention Tonner or Tonner's reasons for expanding the Reservation.

8. Mr. S.A. Galpin, a clerk in the Commissioner's office, "acting" as Commissioner for newly appointed J.Q. Smith,

prepared a proposed Executive Order and submitted it to the Secretary of the Interior on May 10, 1876. Twice referencing Morford's letter, Galpin requested that the President change the Reservation boundary between Riverside Mountain and La Paz Arroyo "so that when it reaches the west bank of the Colorado River, it follow said west bank down the river . . . ." With one exception, the proposed order repeated verbatim the 1874 Order's description of the Reservation boundaries. The change was that the direct line from Riverside Mountain to La Paz Arroyo now stopped when it reached the "west bank of the Colorado River" and the remainder of the western boundary was described as the "west bank" down the river to the Arroyo (AI U.S. Ex. 505):

> . . . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning [still at a point where La Paz Arroyo enters the Colorado River, four miles above Ehrenberg in Arizona].

AI U.S. Ex. 505b. Acting Secretary of the Interior Gorham immediately forwarded the Executive Order to President Grant with a recommendation that it be signed. AI U.S. Ex. 505c. Neither the Acting Commissioner nor the Acting Secretary mentioned Tonner or his previously stated purposes in requesting an expansion of the Reservation.

9. President Grant's Executive Order of May 15, 1876 ("1876 Order") tracked the language of the order forwarded to him. By way of explanation, it noted that the 1874 Order, while adding new lands to the Reservation in California, had failed to include some of the land in Arizona which had been made part of the Reservation by the 1865

Act and the 1873 Executive Order. It also stated "the order of November 16, 1874 did not revoke the order of November 22, 1873" and that "all lands withdrawn from sale by either of these orders are still set apart for Indian purposes . . . ." It did not mention Tonner or any other purposes of the order. AI U.S. Ex. 505.

10. On May 18, 1876, Commissioner of Indian Affairs J.Q. Smith forwarded a copy of the Executive Order to Agent Morford, which he described as "covering the limits of the two previous orders." He did not inform Morford that his recommendation had been altered in any way. AI Calif. Ex. 3530-B.

11. The portion of the Reservation boundary established by the 1876 Order below the point where the boundary line south from Riverside Mountain intersects the west bank of the Colorado River is referred to in these Findings as the "disputed area."

12. No survey of the modified western boundary of the Reservation in the disputed area established by the 1876 Order was requested by the Commissioner of Indian Affairs or conducted by the General Land Office following its issuance. In response to an inquiry in January 1878, however, General Land Office Commissioner Williamson explained why no survey had been conducted of that area: "[s]ince the reservation is bounded by natural limits, to-wit, the west bank of the river, no actual survey of the meanders of the same has since been made." SP Ex. 16. That same year a survey of certain public lands in California in the vicinity of Riverside Mountain and below was carried out by W.F. Benson. The approved survey plats show no Reservation land in the disputed area. SP Exs. 6, 6H and 6I.

13. All of the maps of the Reservation in the *Arizona I* record, which were incorporated into the record of this proceeding, and 12 additional maps introduced by the State Parties in this proceeding, prepared by the Bureau of Indian Affairs and various other federal agencies from 1913-1955, *i.e.*, prior to the United States' presentation of evidence in support of its water claims for the Colorado River Indian Tribes in *Arizona I*, show the Colorado River as the western boundary of the Reservation in the disputed area.[1] None show a fixed boundary line anywhere west of the river.

14. Dr. Fred Nicklason, the United States' expert historian in these proceedings, uncovered no maps prepared prior to the presentation of the United States' evidence in *Arizona I* showing the disputed area to be part of the Reservation. SP Ex. 7.

15. In February 1874 an official survey was conducted of certain public lands in California opposite the southern end of the Reservation by O.P. Callaway which identified a substantial area of those lands as "swamp and overflowed." The Callaway survey was approved in December 1874. CRIT Ex. 9.

In the Fall of 1877, a difference of opinion arose between the Commissioner of Indian Affairs and the Commissioner of the General Land Office over whether the lands surveyed by Callaway were Indian trust lands within the boundaries of the Reservation or were still public lands. GLO Commissioner Williamson advised Secretary of the Interior Schurz that the lands "appear to be wholly outside the boundaries of the Indian Reservation." SP Ex.

[1] AI Calif. Exs. 2617A-2617C (Tr. 14, 228-35), 3532-3534 (Tr. 20, 257-60), 3538, 3544 (Tr. 20, 309-13); SP Exs. 6 and 6J.

31-33. In May 1878 Secretary Schurz approved and transmitted a list of those lands to the State of California as their entitlement under the Swamp and Overflowed Lands Act of 1850. A patent was issued to the State for the lands in 1890. SP Exs. 36, 27.

16. The record in *Arizona I* shows that, as of the date of trial in 1958, (1) a substantial portion of the disputed area, including the swamp and overflowed lands transferred to California, was then either irrigated or improved for irrigation by private citizens who were neither Indians nor acting pursuant to authorization from or on behalf of the United States or the Indians, (2) a major portion of the disputed area lay within the boundaries of the Palo Verde Irrigation District, received water service through the facilities of the district,[2] and was then assessed by the Palo Verde Irrigation District pursuant to California law, some of them since 1927.[3]

As of 1990 the land ownership records of Riverside County, California for the lands within the disputed area show them as in private ownership, except for lands within the so-called "Olive Lake cutoff" area, to which title was quieted in the Tribes in 1983. SP Exs. 8, 9; Finding 19 *infra*.

17. The record in *Arizona* and in these proceedings contains no evidence that the Bureau of Indian Affairs or any other federal agency had ever asserted jurisdiction over the disputed area on behalf of the Colorado River Indian Tribes or that any claim of ownership of the lands in question had ever been made to the private oc-

[2] AI Tr. 14, 130-31A, 14, 055-57 (Rupkey); 20, 459 (Shipley).

[3] AI Calif. Ex. 3547; Tr. 20, 431-38, 20, 514 (Shipley).

cupants of those lands on behalf of the Tribes prior to the United States' claims in *Arizona I*, except for the Olive Lake cutoff area and a claim by the Commissioner of Indian Affairs in the Fall of 1877 which was rejected by the Secretary of the Interior, as detailed in Finding 15. SP Ex. 6; Tr. 318, 540-42.

18. The record in *Arizona I* shows that other federal administrative action in which the Bureau of Indian Affairs participated treated the Colorado River as the boundary in the disputed area and that the lands in the disputed area were not held in trust for the Colorado River Indian Tribes—namely: (a) the grant of a highway right-of-way through the disputed area to the State of California[4] and (b) the construction of Palo Verde Dam.[5]

19. The United States did not file exceptions to Master Rifkind's recommended findings and conclusions on the Colorado River Indian Reservation boundary dispute, (which fixed a riparian boundary), in *Arizona I*. In 1972 the United States instituted an action in the United States District Court for the Central District of California on behalf of the Colorado River Indian Tribes to quiet title to the lands in the Olive Lake "cutoff" area in California which Master Rifkind had found to be Reservation lands based on a change in the location of the Colorado River by avulsive action and which had been awarded a water right in the Supreme Court's 1964 decree in *Arizona I*. The Tribes subsequently intervened. The United States' pleadings were premised on an interpretation of the 1876

[4] AI Calif. Exs. 3543-43G; Tr. 20, 306-09; Rifkind Report at 276, n. 40.

[5] AI Calif. Exs. 361, 3535, 3536 (Tr. 20, 270-71), 3537, 3544 (Tr. 20, 309-13); Tr. 14, 131-32 (Rupkey), 20, 266-75 (Stetson); Rifkind Report at 276, n. 40.

Order as creating the west bank of the Colorado River as a boundary subject to the rules of erosion, accretion and avulsion, as was the Tribes' unsuccessful petition for certiorari to the Supreme Court for review of the Ninth Circuit's decision in *United States v. Aranson*, 696 F.2d 654, *cert. denied*, 464 U.S. 982 (1983). SP Exs. 12, 18.

20. The Executive Order of 1876, which is controlling in this dispute, established the western boundary of the Colorado River Indian Reservation as a riparian boundary and not as a fixed line.

Dated: September 20, 1993

Frank J. McGarr
Special Master

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